IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2007

STATE OF TENNESSEE v. THOMAS C. RUSSELL

Appeal from the Criminal Court for Anderson County
No. A3CR0300 Donald R. Elledge, Judge

No. E2006-00827-CCA-R3-CD - Filed May 24, 2007

The defendant, Thomas C. Russell, appeals the Anderson County Criminal Court's order of confinement for the defendant's Range II, eight-year sentence for a conviction of aggravated assault. Because no reversible error occurred, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Mart S. Cizek, Clinton, Tennessee, for the Appellant, Thomas C. Russell.

Robert E. Cooper, Jr., Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; David S. Clark, District Attorney General; and Jan Hicks, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The defendant was indicted for especially aggravated robbery, a Class A felony, *see* T.C.A. § 39-13-401(a) (2006), and the record shows that, pursuant to an agreed amendment of the indictment, the defendant pleaded guilty to one count of aggravated assault, a Class C felony, *see id.* § 39-13-102. He agreed to a Range II, eight-year sentence and submitted the manner of service of the sentence to the trial court. Following a sentencing hearing, the court ordered that the sentence be served in confinement. The defendant filed a timely notice of appeal.

The transcript of the plea submission hearing reveals that the defendant and the victim, Sam Poston, were entangled in a dispute over the estate of the defendant's deceased half-brother, James Russell. On August 18, 2003, the defendant and his brother, Bobby Russell, went to the residence of the victim, whose wife was apparently administering the decedent's estate. During an argument with the victim, the defendant's brother struck the victim with his fists, and the

defendant stabbed the victim twice with a knife. The victim recovered from the wounds, except that he continued to experience some numbness in his leg and problems with a hernia.

In the sentencing hearing, the victim testified that when the defendant and Bobby Russell came to the victim's residence on August 18, 2003, they claimed that they had been "cheated" in the handling of James Russell's estate by the victim's wife, who was the deceased brother's sister-in-law. The victim testified that the defendant and Bobby Russell showed the victim and his wife a device that they represented to be a bomb and that the men threatened to "blow us up."[1] The confrontation occurred in the victim's yard, and when the victim took his wife by the arm and started to leave, the defendant and his brother attacked them from the rear. The victim swung an outdoor-type extension cord at the assailants as a means of self-defense. Despite this effort, Bobby Russell struck the victim twice in the jaw with his fist, and the defendant stabbed the victim twice. The victim testified that the defendant then took the victim's wife into the house, holding the knife to her throat. Apparently, the defendant then forced the victim's wife to write a check to the defendant and his brother for settlement of the estate.

The presentence report revealed that the defendant had no prior convictions.

The defendant's wife of 40 years testified that the defendant worked at a textile mill for 31 years, until his health declined. She testified that the defendant had been disabled since 1996. The couple had three children and six grandchildren. The defendant and his family provided a home to the defendant's brother, Bobby, who was disabled from a brain injury he had suffered as a young man in military service. Ms. Russell testified that the defendant carried a pocket knife, and based upon her demonstration in court, the knife's blade was about three inches long. She testified that the defendant did not know why he was arrested after the incident at the victim's house until she explained it to him after he had undergone an operation to insert a coronary stint. She testified that the defendant remained steadfast in denying that he stabbed anyone.

A 40-year friend of the defendant testified that the defendant was an upright citizen who had no history of getting into trouble. He testified that the defendant attended church regularly and had a reputation as a truthful person. On cross-examination, the witness stated he was only vaguely aware that the defendant, who was born in 1949, had been charged with attempted first degree murder when he was 26 years old.

The defendant's 37-year-old son testified that the defendant was limited by his poor health but maintained an active relationship with his grandchildren. The witness testified that he accompanied the defendant on a visit to the victim's house prior to August 18, 2003, and that the victim's wife said she would bring money in a few weeks to satisfy the defendant's claim upon James Russell's estate. The witness testified that, in 1975, he was present when the defendant fired a weapon into the air to break up a fight in which a "man was beating [the defendant's] uncle to

[1] The device, a metal briefcase containing switches, wiring, red light, and sticks that resembled dynamite, was later determined to be a simulated bomb and not an explosive device.

death." As a result of this incident, a warrant for the defendant's arrest for attempt to commit first degree murder was issued, but the charge was promptly dismissed.

The defendant testified that he was "cloudy" about his guilty plea in the present case but understood that he had agreed to an eight-year sentence. He testified,

> I don't know what I've done [to the victim and his wife]. I've been on strong medications, and my mind has been very cloudy. I've had a stroke, and I've had four heart attacks. I had a heart attack that very day – the circulation – I haven't got long to live no way.

The defendant testified he was not denying that the victim "got hurt," but he denied knowing how it happened. He testified that he worked in the textile mill for 32 years, sometimes 16 hours a day. He had attended the same church for 50 years. He affirmed that in 1975 he broke up a fight by firing a bird-shot-loaded .22 gun into the air. Although he was charged with an offense, the charge was dismissed two weeks later.

The defendant also testified that within the past year, he had been hospitalized for five weeks in an intensive care unit and was comatose for three weeks. He suffered from a stomach hematoma, double pneumonia, and a stroke, and he lost his vision for five weeks. After leaving the hospital, he had been wheelchair bound for three months. At the time of the sentencing hearing, the defendant wore a brace on his left arm to prevent his hand from "drawing" or forming a "claw hand." He exhibited to his testimony letters from physicians to support his diagnoses and medical condition and a list of the 21 medications that had been prescribed for him. He testified that he takes about 40 pills a day and uses a "breathing machine for [his] lungs." He testified that as a result of a stroke, his brain is "part dead" and that he had been taking prescribed medication for depression.

The defendant testified that the visit to the victim's house when the defendant was accompanied by his son was very pleasant and sociable.

Bobby Russell, the defendant's brother, testified that he had lived next door to or with the defendant for a long time, due to disability from a head injury he sustained as a young man in the army.

Following arguments of counsel, the trial court stated fact findings from the bench. It found that the defendant had a "selective memory" and stated to the defendant, "There is no credibility that you have with this Court, none." The judge said he was "offended by the testimony." The judge characterized the conviction offense as serious and opined that the defendant was "given a break in the [charge] reduction." The trial court then imposed the defendant's plea-bargained Range II, eight-year sentence to be served in confinement.

On appeal, the defendant claims that the trial court erred in not allowing the defendant "to serve his eight-year sentence on probation or some other alternative sentence."

When a defendant challenges the manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption, however, is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, even if we would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine propriety of sentencing alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. § 40-35-210(a), (b) (2003); *id*. § 40-35-103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

A defendant who is an "especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2003). A defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). However, as a Range II, multiple offender, albeit by agreement, the defendant in the present case did not enjoy the presumption of favorable candidacy for alternative sentencing. *See* T.C.A. § 40-35-102(6). In this situation, the State had no burden to justify a sentence involving incarceration, and the burden of establishing suitability for alternative sentencing rested upon the defendant. *See, e.g., State v. Michael W. Dinkins*, No. E2001-01711-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Apr. 26, 2002); *State v. Joshua L. Webster*, No. E1999-02203-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Dec. 4, 2000); *see* T.C.A. § 40-35-103(1).

That said, the defendant was statutorily eligible for probation. *See* T.C.A. § 40-35-303(a) (2003). The determination of entitlement to full probation, however, necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant

is required to establish his "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dyke*s, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10.

In the present case, the record does not reflect that the trial court engaged in a review of the relevant sentencing principles and considerations. Accordingly, we do not apply the presumption of correctness to the court's denial of probation.

Looking to the substantive issues, we first review the claim that the trial court should have fully suspended the defendant's sentence pursuant to Tennessee Code Annotated section 40-35-303. The trial court obviously relied heavily upon the defendant's lack of credibility and candor in denying probation. We recognize that the assessment of witness credibility is solely entrusted to the trial court as the finder of fact. *See State v. Adkins*, 786 S.W.2d 642, 646 (Tenn. 1990). Also, a sentencing court may appropriately consider "the defendant's candor and credibility, or lack thereof, as indicators of his potential for rehabilitation" and, accordingly, as a basis for denying full probation. *See*, *e.g.*, *State v. Michael K. Miller*, No. W2003-01621-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Jackson, July 27, 2004). Deferring to the trial judge's credibility determinations, we see that the record establishes a basis for negative credibility and candor findings and, accordingly, for denying probation. Thus, we hold that the defendant carried neither his burden of establishing in the trial court his suitability for probation nor his burden of demonstrating on appeal why the trial court erred in not suspending his sentence.

Next, we review the claim that the trial court erred in rejecting forms of alternative sentencing other than full probation.

We recognize that *when the presumption of favorable candidacy for alternative sentencing applies*, the State may overcome the presumption by establishing that any condition enumerated in Code section 40-35-103(1) is apt, one of which is the necessity to avoid depreciating the seriousness of the offense. *See* T.C.A. § 40-35-103(1)(B). This subsection's reference to the need to avoid depreciating the offense essentially codifies the traditional consideration of the "nature and circumstances" of the offense. *See State v. Hartley*, 818 S.W.2d 370, 375 (Tenn. Crim. App. 1991). We also recognize that in addressing the presumption of favorable candidacy, a trial court should not base a denial of alternative sentencing solely upon the nature and circumstances of the offense unless "the nature and circumstances of the offense are 'especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree'" and outweigh all other considerations. *See, e.g., State v. Kerry D. Hewson*, slip op. at 9, M2004-02117-CCA-R3-CD, (Tenn. Crim. App., Nashville, Sept. 28, 2005) (quoting *State v. Travis*, 622 S.W.2d 529, 534 (Tenn. 1981)).

In the present case, however, we have determined that the presumption of favorable candidacy does not apply because the defendant is deemed a Range II, multiple offender. *See* T.C.A. § 40-35-102(6). Accordingly, the State had *no* burden of establishing a Code section 40-35-103(1) basis for a sentence of full confinement. *See, e.g., Michael W. Dinkins*, slip op. at 3; *Joshua L. Webster*, slip op. at 3. Additionally, the defendant has the burden on appeal of showing that the trial court's sentencing determination is erroneous. *Ashby*, 823 S.W.2d at 169.

The defendant essentially maintains that he has carried a burden of justifying alternative sentencing based upon his lack of a criminal record, his work and family history, and his medical problems. Against this context, our de novo review indicates, however, that counterweights exist.

First, a sentencing court may consider a defendant's enjoyment of leniency in the selection of a particular conviction offense in awarding or rejecting alternative sentencing options. *State v. Samuel D. Braden*, No. 01C01-9610-CC-00457, slip op. at 15 (Tenn. Crim. App., Nashville, Feb. 18, 1998)*; State v. Steven A. Bush*, No. 01C01-9605-CC-00220, slip op. at 9 (Tenn. Crim. App., Nashville, June 26, 1997); *State v. Fredrick Dona Black*, No. 03C01-9404-CR-00139, slip op. at 3-4 (Tenn. Crim. App., Knoxville, Apr. 6, 1995).

Just as the trial court relied upon the consideration of leniency reflected in the imposition of a Class C conviction of aggravated assault, we recognize that the defendant's actions imperiled him of a conviction of Class A felony especially aggravated robbery, *see* T.C.A. § 39-13-403 (2006) (proscribing robbery accomplished with a deadly weapon and resulting in serious bodily injury to the victim), or of Class B felony aggravated robbery, *see id.* § 39-13-402 (proscribing robbery accomplished with a deadly weapon "or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon"). At least alternatively, he could have been prosecuted and convicted of Class A felony especially aggravated kidnapping of the victim's wife, *see id.* § 39-13-305(a) (proscribing false imprisonment accomplished with a deadly weapon). Although the defendant pleaded "out-of-range" to a Range II, multiple offender classification, thereby agreeing to a sentence that is two years longer than that available in Range I for a Class C offense, *compare id.* § 40-35-112(a)(3) (authorizing punishment for Class C offenses in Range I) *with id.* § 40-35-112(b)(3) (authorizing punishment for Class C offenses in Range II), and although the release eligibility of a Range II offender is 35 percent as opposed to 30 percent for that of a Range I offender, *see id.* § 40-35-501(c), (d), the avoidance of a Class A felony conviction, in particular, is of significant benefit to the defendant, enabling him to escape liability for a sentence "not less than fifteen (15) years nor more than twenty-five (25) years," *see id.* § 40-35-112(a)(1). Under these circumstances, we can only conclude that ordering the defendant's eight-year sentence to be served in confinement is warranted.

The consideration of a lack of candor or credibility also may serve as a factor when no presumption of favorable candidacy for alternative sentencing applies. *See* T.C.A. § 40-35-103(5) ("The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed."); *see, e.g.,*

Michael K. Miller, slip op. at 3 (stating that a defendant's candor and credibility are indicators of his potential for rehabilitation). Although this consideration may not alone support a refutation of an applicable presumption of favorable candidacy for alternative sentencing, it counter-weighs against the defendant's proof, especially when considered in conjunction with the "leniency" factor.

Accordingly, the judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE